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Canadian Government's Proposed Extension of Time Limits Due to COVID-19

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As part of the federal government's response to the COVID-19 pandemic, the Department of Finance recently published a draft legislative proposal, the *Time Limits and Other Periods Act (COVID-19)* (Proposal), that, if implemented, would provide for an automatic six-month suspension of time limits in federal civil proceedings and would permit the extension or suspension of federal statutory and regulatory time limits in a range of areas.

Automatic Suspension of Time Limits in Civil Proceedings

As drafted, the Proposal would automatically suspend any deadlines or prescription periods for instituting civil proceedings or taking steps in ongoing civil proceedings before federal courts for the period from March 13, 2020, to September 13, 2020 (or such earlier date set by the federal Cabinet). This suspension does not apply to criminal matters.

Assuming the Proposal is adopted as proposed, the period between March 13 and September 13, 2020, would be excluded for purposes of, among other things, calculating the deadline to file notices of appeal or other originating motions to the Tax Court of Canada, the Federal Court of Canada, the Federal Court of Appeal and the Supreme Court of Canada.

Allowing Federal Ministers to Extend or Suspend Other Specified Existing Legislative Time Limits for up to Six Months

The Proposal would also allow the responsible ministers under the covered legislation and regulations to make orders extending or suspending certain legislative time limits or deadlines for up to six months, with potential retroactive effect to March 13, 2020. Such orders may not be issued after September 30, 2020, and may not be for a duration exceeding six months.

The Proposal lists 13 regulations as well as 121 specific provisions across 30 federal acts and regulations that could be affected, including provisions under the *Income Tax Act* (ITA), the *Excise Tax Act* (ETA), the *Bankruptcy and Insolvency Act* (BIA), the *Companies' Creditors Arrangement Act* (CCAA), the *Canada Business Corporations Act* (CBCA) and the *Canada Not-for-profit Corporations Act* (CNCA).

Some of the time limits covered by the Proposal are discussed in further detail below.

ITA and ETA

Under the ITA, the Canada Revenue Agency (CRA) can generally reassess a taxpayer within three years (in the case of most taxpayers) or four years (in the case of mutual fund trusts or corporations that are not Canadian-controlled private corporations) following the date on which the CRA originally assessed the taxpayer for income tax. This "normal reassessment period" can be extended in certain circumstances, depending on the taxpayer, the provision or the transaction at issue. Similar rules apply under the ETA, whereby the CRA generally has four years following the date that the GST/HST return was filed to reassess a taxpayer for sales tax. Once the relevant limitation period expires, the year or period at issue is considered "statute-barred," and the CRA is generally prevented from reassessing unless it can establish that, among other things, the taxpayer made a negligent misrepresentation or committed fraud.

The Proposal would allow the Minister of National Revenue to extend the period within which the CRA can issue reassessments in respect of years or periods that would otherwise have become statute-barred by up to six months.

Unlike most other filing requirements under the ITA, the rules related to scientific research and experimental development (SR&ED) claims are absolute, meaning that the CRA has no ability to accept late-filed SR&ED claims or to waive the requirement to file related documents even on fairness grounds. In this respect, the Proposal would allow the Minister to extend the deadlines for filing SR&ED claims as well as to make claims for SR&ED investment tax credits.

It should be noted that the deadline for filing notices of objection to tax assessments is not extended under the Proposal. However, the government's news release on March 27, 2020, confirmed that the deadline for filing notices of objection due March 18, 2020, or later is extended until June 30, 2020. The government has not yet announced any extensions for objections due after June 30, 2020.

BIA and CCAA

Under the BIA, filing a notice of intention to make a proposal (i.e., a notice by an insolvent person that it intends to make an offer to its creditors to compromise its debts) triggers a series of time limits relating to the filing of certain documents (including a formal proposal) and the notification of creditors. Failure to respect these timelines will, in the absence of a court-ordered extension, cause the insolvent person to be deemed to have made an assignment in bankruptcy.

The Proposal would allow the Minister of Innovation, Science and Industry to extend or suspend certain time limits related to the proposal process. Specifically, the Minister may extend

- the time by which an insolvent person must file cash flow statements and certain other documents with the official receiver;
- the time by which the trustee must notify known creditors following a notice of intention to make a proposal;
- the time after which an insolvent person is deemed to have made an assignment in bankruptcy;
- the time within which an insolvent person may seek a court-ordered extension in respect of the proposal process; and
- the time after which a consumer proposal is deemed to be annulled.

Although the rules in the CCAA relating to an insolvent company's ability to restructure its affairs under court supervision are generally more flexible and remedial than those imposed under the BIA, the CCAA also imposes certain time limits. In this respect, the Proposal would allow the Minister to extend the period of the initial stay that a court may grant to a debtor company upon its initial application under the CCAA; it would also make parallel changes under the related provisions for interim financing.

CBCA and CNCA

Under the CBCA, federally incorporated corporations are required to comply with specific timelines for calling annual meetings of shareholders and preparing and delivering annual financial statements. Specifically, the first annual meeting must be held within 18 months of incorporation, and each subsequent annual meeting must be held within 15 months of the previous annual meeting unless extended by court order. The business transacted at an annual meeting of a corporation generally consists of, among other things, the consideration of financial statements, the appointment of auditors or dispensing with such appointment, and the election of directors. Similar rules apply under the CNCA with respect to annual meetings of members of a federal not-for-profit corporation.

The Proposal would allow the Minister of Innovation, Science and Industry to make an order extending the periods established under the CBCA and the CNCA for calling and sending notices of annual meetings of shareholders or members, and providing shareholders or members and the CBCA Director with copies of annual financial statements that could be dated more than six months after the financial year-end.

Investment Canada Act

For our commentary on the implications of the Proposal to proceedings under the *Investment Canada Act*, see Canadian Government's Proposed Extension of Time Limits Has Implications for ICA's National Security Review Process.

Commentary

The government has indicated that the Proposal will be available online for 10 days and that interested stakeholders are welcome to share their views with the Department of Justice.

At this time, the responsible ministers have provided little information regarding if and when they will be issuing orders and what conditions those orders may be subject to, the lack of which creates some uncertainty. For example:

- Ministers will have until September 30, 2020, to issue orders potentially having retroactive effect to March 13, 2020. Limitation periods that have already passed (e.g., statute-barred periods in tax matters) may therefore be reopened.
- It is not entirely clear whether the extensions contemplated by the Proposal will be applied to all time limits covered by the Proposal and, if so, whether this will be done in a consistent manner. As a result, a minister may opt to exercise her or his powers partially or inconsistently – for instance, by extending only one of the many time limits that could be extended, by extending one time limit retroactively and another one prospectively or by subjecting different groups or classes of persons to different rules.

In addition, the federal Cabinet may unilaterally decide, at any time prior to September 30, 2020, to truncate the automatic suspension period in civil proceedings, which for now is slated to continue until September 13, 2020. Giving the federal Cabinet authority over the civil litigation process is somewhat unusual, and it is not entirely clear why such an authority is necessary.

Although the government understandably needs the flexibility to address the unexpected consequences of the COVID-19 pandemic in a range of areas, procedural certainty is important. We hope to receive clearer guidance from the responsible ministers over the next few weeks on how they intend to apply their extension and suspension powers under the Proposal, if and when it is adopted.

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